

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-21413

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MARIAN SALOMON,

Petitioner-Appellant,

-against-

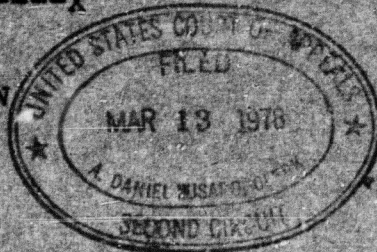
J. EDWIN LaVALLEE, Superintendent,
Green Haven Correctional Facility,

Respondent-Appellee.

*Judge
Carter*

*B
Pgs 5*

MEMORANDUM OF LAW



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
MARIANO SALOMON, :
 :
Petitioner-Appellant, :
 : Docket No. 77-2143
-against- :
 :
J. EDWIN LaVALLEE, Superintendent, :
Green Haven Correctional Facility, :
 :
Respondent-Appellee.
-----X

MEMORANDUM OF LAW

Preliminary Statement

This is an appeal from an order of the United States District Court for the Southern District of New York (Pollack, J.), entered June 17, 1977 denying, following a hearing, appellant Mariano Salomon's petition for a writ of habeas corpus on the ground that appellant's Sixth Amendment rights had been violated by the joint representation of petitioner and his co-defendant at trial. A prior judgment of the District Court (Pollack, J.), dated July 20, 1976, also denying the petition, was vacated by this Court in an order dated March 11, 1977, which order remanded the petition to the District Court for consideration of the question of waiver.

In the decision now being appealed, Judge Pollack, after a hearing, found that the joint representation had not resulted in any conflict of interest or prejudice, and therefore petitioner's Sixth Amendment right had not been violated. On the basis of this finding, he deemed it unnecessary to reach the question of waiver.

Questions Presented

1. May the decision below, rendered after a factual hearing, that neither a conflict of interest nor prejudice arose out of the joint representation of petitioner and his co-defendant during their state court trial, be disturbed on the allegation that a conflict of interest per se arises when two defendants are jointly tried on charges of possession and sale of a controlled substance, and their retained joint counsel interposes an "agent for buyer" defense for one and an "innocent bystander" defense for the other?

2. Was petitioner's Sixth Amendment right violated because the state court did not prevent him from being represented by counsel of his own choosing jointly with his co-defendant, even though the hearing held by the court below demonstrated that such joint representation resulted neither in a conflict of interest nor in prejudice to petitioner?

3. Was the District Court correct in placing on petitioner the burden of proof in this habeas corpus proceeding on the issue of conflict of interest and prejudice?

Statement of Facts

Procedural Background

Petitioner-appellant Salomon challenges a conviction for criminal sale of a controlled substance in the first degree and criminal possession of a controlled substance in the first degree rendered after a jury trial before the Hon. Mary Johnson Lowe in Supreme Court, New York County on June 11, 1974. Petitioner was sentenced to a mandatory minimum term of 20 years and a maximum term of life on each count, to run concurrently.

The judgment of conviction was affirmed without opinion by the Appellate Division, People v. Salomon, 377 N.Y.S. 2d 347 (1st Dept. 1975), that court rejecting petitioner's claim that he was deprived of the effective assistance of counsel by a conflict of interest caused by his attorney's joint representation of petitioner and his co-defendant Victor Colon. Leave to appeal to the Court of Appeals was denied.

On March 12, 1976 petitioner filed a federal habeas corpus petition on the same Sixth Amendment grounds.

In his decision of July 20, 1976, Judge Pollack dismissed the petition, finding that (1) the burden was on petitioner to show prejudice resulting from the joint representation (Exh. "B", Appendix for petitioner, p. 2, footnote); (2) petitioner had expressly consented on the trial record both to the adequacy of his counsel's preparation and to the substitution of counsel late in the trial proceedings (Id., p. 1); and (3) petitioner had failed to meet his burden of making the requisite concrete showing of "some specific instance of prejudice, some real conflict of interest resulting from the joint representation," (Id. at 2), in that "there is no reason to believe that [separate] counsel for the co-defendant would not have pressed the 'buyers agent', defense for Colon, and no claim is made that Salomon was dissuaded from testifying because of the joint representation." Id. at 3.

Petitioner then filed a pro se application to this Court for a certificate of probable cause, for leave to appeal in forma pauperis, and for assignment of counsel. On March 11, 1977, this Court, in an ex parte order, vacated the judgment of the District Court and remanded the cause "for consideration of the question of waiver." (Exhibit "C", Appendix for Petitioner).

Pursuant to the remand, on June 2 and 3, 1977, Judge Pollack held a hearing at which the petitioner, his trial counsel, Otto Fusco, Esq. and trial counsel's partner and brother, Fernando Fusco, Esq., testified. On June 17, 1977, Judge Pollack issued a memorandum and order again denying the petition on the finding that petitioner had failed to meet his burden of demonstrating that "the joint representation or his lawyer's trial strategy was conducive to or created or resulted in any conflict of interest or prejudice" (Exhibit "D", Appendix for Petitioner, p. 3).

The Crime*

On November 8, 1973, Mariano Salomon and a co-defendant Victor Colon, sold over a pound of cocaine to undercover Police Officer Rocco Galasso. By a 1973 indictment, both defendants were charged with the criminal sale of a controlled substance in the first degree and criminal possession of a controlled substance in the first and third degrees. Indictment No. N-1622-416/73. On April 23, 1973, both defendants proceeded to trial before the Hon. Mary Johnson Lowe, and a jury.

* This section and the section following (pp. 5 to 15) are obtained from the District Attorney's brief submitted to the Appellate Division, First Department.

On May 3, after a week-long trial, the jury found the defendants guilty of criminal sale of a controlled substance in the first degree and criminal possession of a controlled substance in the first degree. Colon was sentenced concurrently to an indeterminate term of fifteen years to life. Salomon was sentenced concurrently to an indeterminate term of twenty years to life.

The Evidence of Petitioner's Guilt

On November 8, 1973, Mariano Salomon and Victor Colon sold over a pound of cocaine to undercover Police Officer Rocco Galasso. The arrangements for the drug purchase and the subsequent arrest of the defendants were the result of an extensive joint investigation by New York City Police Officers and federal agents in the New York Drug Enforcement Task Force.

The Arrangements for the Sale of a Pound of Cocaine

On October 2, 1973, undercover officer Rocco Galasso was first introduced to the defendant, Victor Colon, by a

confidential informant (Galasso: 239-40).* Thereafter through a number of phone calls between November 5 and 8, Officer Galasso arranged with Colon to purchase a pound of cocaine which was to be delivered by the defendant Mariano Salomon. All of the phone calls were tape recorded (Peo's Exhs. 3-6, 10) and made by Galasso, in the presence of another officer, from a special telephone located in a small cubicle-shaped room used by undercover officers at the Drug Enforcement Task Force Offices at 201 Varick Street (Galasso: 241-42, 244-45, 251-52, 256-58, 264-67; Fary: 48-50, 57-58, 60-61, 63). The telephone number which Galasso called was given to him by Colon and was the number of the Hunt's Point Paint and Hardware Store located at 882 Hunt's Point Avenue in the Bronx (Galasso: 242; Fary: 54).

The Two Phone Calls on November 5, 1973

At approximately 5:35 p.m., on November 5, 1973, Officer Galasso, in the presence of Police Officer Richard Fary, made his first telephone call to Colon (Galasso: 241; Fary: 48). During a short conversation, Galasso asked the price for a pound of cocaine, and Colon said it was \$3,000 (Galasso: 243). Galasso then agreed to purchase a pound of cocaine for \$3,000 (Galasso: 243).

* Unless otherwise indicated, parenthetical numerical references are to the pages of the trial transcript. The name in parenthesis refers to the witness who was the source of the testimony.

However, after hanging up and speaking with Officer Fary, Galasso realized that the price Colon had quoted was too low to be correct. So, Officer Galasso called Colon back immediately and told him that the price they had agreed upon seemed too low (Galasso: 245). Colon agreed and told and told Galasso that he would try to find out the correct price (Galasso: 245).

The Phone Call on November 6, 1973

On the next day, at about 3:05 p.m., Officer Galasso, again in the presence of Officer Fary, called Colon at the Hunt's Point Store (Galasso: 251; Fary: 58). In this taped conversation, Galasso and Colon again agreed that the price they had talked about the day before was wrong (Galasso: 252). However, Colon said that he had four ounces of cocaine available for \$3,000 (Galasso: 252). Officer Galasso replied that he still wanted a pound of cocaine. He told Colon to find out the correct price and said he would call Colon back the next day (Galasso: 252).

The Three Phone Calls on November 7, 1973

On the following day at approximately 2:45 p.m., Officer Galasso, in the presence of Detective Palmer, again

called Victor Colon (Galasso: 256). But, Galasso and Colon were still unable to make final arrangements for the purchase of a pound of cocaine. Colon said that he still only had the four ounces of cocaine for \$3,000 and had not yet learned what the pound of cocaine would cost. Colon then told Galasso to call back at about 5:30 p.m. (Galasso: 257).

However, when Officer Galasso called Colon back at 5:37 and 6 p.m., Colon was not at the Hunt's Point Paint and Hardware Store (Galasso: 258). [These two calls, as well as the earlier one at 2:45 p.m., were tape recorded.]

The Two Phones Calls on November 8, 1973

At about 12:25 p.m. on November 8, Officer Galasso, in the presence of Special Agent Francis Dunham, again called Victor Colon (Galasso: 264; Dunham: 164-65). In this taped conversation, Colon told Galasso that a pound of cocaine would cost \$12,000. Galasso said he had almost that much money and he would call back in about two or two and one-half hours to let Colon know if he would definitely be able to purchase the pound of cocaine (Galasso: 264-65).

Police Officer called Colon back at approximately 3 p.m. (Galasso: 265-66; Dunham: 165). He told Colon that he had the \$12,000 and he would be at the Hunt's Point Store around 5:00 or 5:30 p.m. to purchase the pound of cocaine (Galasso: 266).

The November 8 Sale of a Pound of Cocaine

At about 2 p.m. several members of the Joint Task Force team left their offices for the area of the Hunt's Point Paint and Hardware Store (Fary: 65). Officer Fary and Special Agents Miller and Mulhern went in a Ford truck specially equipped with two-way mirrors (Fary: 65). At about 3 p.m. they parked on Hunt's Point Avenue about 20 or 25 feet away from the front door of the paint and hardware store (Fary: 71-75, 120). Other members of the Task Force group were also in the area and remained in radio communication with the team in the Ford truck (Fary: 72).

On that same afternoon at approximately 3:30 p.m. Undercover Officer Galasso left the Task Force Office with \$12,000 that had been requisitioned by Special Agent Dunham for the purchase of the pound of cocaine (Galasso: 271; Dunham: 169). Galasso drove alone to the vicinity of Edgewater Road and Westchester Avenue in the Bronx where he met two

members of his backup team (Galasso: 271-72). At about 4:50 p.m. Galasso left the area of Edgewater and Westchester Avenue (Galasso: 272).

At approximately 4:55 p.m. Galasso arrived at the Hunt's Point Store at 882 Hunt's Point Avenue and double parked his car in front of the store near the Ford truck (Galasso: 272; Fary: 76). Galasso got out of his car and entered the store where he met Colon (Galasso: 272; Fary: 77). Colon told Galasso that "the package had not been delivered as of yet, and just to be patient and wait" (Galasso: 273). Galasso waited in the store as business was conducted as usual (Galasso: 273).

While Galasso was waiting, Colon spoke three times in a low voice with someone on the phone (Galasso: 273). After each call, Colon said, "the man was on the way" (Galasso: 274). After one of these calls, Colon said, "Mario was on the way with the stuff" (Galasso: 274). The store closed at 6 p.m. and Galasso, Colon and another fellow, Antonio Jiminez, remained in the store (Galasso: 276).

Salomon Arrives With The Pound of Cocaine

At about 7:25 p.m. Mariano Salomon arrived and knocked on the door (Galasso: 276; Fary: 79). Colon walked over to the

door, parted the shade which was drawn down on the inside of the glass part of the door and looking out said the "man is here" (Galasso: 279). Colon unlocked the door and Salomon, who was carrying a black paper bag in his left hand, entered the store (Galasso: 279; Fary: 79).

After exchanging greetings and talking for a short time, Salomon excused himself and motioned for Galasso and Colon to follow him to the rear of the store (Galasso: 279). All three walked to the rear and there Salomon placed the black bag that he was carrying on a stack of boxes (Galasso: 279). Salomon then stepped back from the bag and said, "I have nothing to do with this deal. It's just [between] you and him" (Galasso: 279). Galasso replied, "Okay, that's good, because that's the way I want it" (Galasso: 279).

Galasso then opened the black bag which contained two clear plastic bags filled with white powder (Galasso: 280). Galasso looked at the two bags and said, "I am not even going to examine the bags* * *I'll take your word for it" (Galasso: 280). Salomon then said, "Well, for all you know I could have put white powder in there. It may not even be coke" (Galasso: 280). Galasso then decided that he ought to check the contents and Salomon helped him by untying the knots on the plastic bags (Galasso: 280).

After satisfying himself that the powder was cocaine, Galasso decided to weigh it and said that he had a scale in his car (Galasso: 281). However, Salomon said, "We have a scale here" (Galasso: 281). Colon then got a scale in the front of the store, returned to the rear again and weighed the cocaine, which was 17 ounces (Galasso: 281). After the plastic bags were weighed, they were placed back into the black bag (Galasso: 282). Galasso then said that he had the money in the trunk of his car and asked Colon if he wanted to go to the car to get it (Galasso: 282).

The Arrest

Colon and Officer Galasso left the store and walked to Galasso's car which was double parked. Galasso then placed the black bag containing the cocaine underneath the front seat on the driver's side of the car (Galasso: 282; Fary: 80). As Galasso was placing the bag underneath the seat, he turned on the car's blinking emergency signals which was a prearranged sign to the members of the backup team that the narcotics had been purchased and that the defendants could be arrested (Galasso: 282; Fary: 83; Dunham: 173).

Officer Galasso and Colon then walked to the rear of the car where Galasso opened the trunk and showed the money to Colon (Galasso: 282; Fary: 81). Galasso then said "the block was too hot to stay here and count the money" and he suggested that they get in the car and count the money as they drove around the block (Galasso: 284; Fary: 82). The money was replaced in the trunk, the two men entered the car and drove away with the emergency flasher still on (Galasso: 284; Fary: 82-83).

Galasso then drove north on Hunt's Point Avenue, turned onto Garrison Avenue and stopped the car about 150 to 200 feet into the block (Galasso: 284). Galasso then got out of the car and placed Colon under arrest (Galasso: 285-86). The undercover officer was assisted by Officers Herlihy and Ruggiero from the 41st Precinct and by four members of his backup team -- Police Officer Heckman, Detective Anthony Minchiello and Special Agents Dunham and Brackley (Dunham: 174; Galasso: 287; Heckman: 555, 565, 569). Galasso recovered the black bag containing the cocaine (Galasso: 287).

Officer Galasso and Heckman returned to the Hunt's Point Store and together with several other members of the Task Force entered the store and arrested Mariano Salomon and Antonio Jiminez, the manager of the store (Fary: 84-89, 143-44; Dunham: 174-77; Galasso: 287-89; Heckman: 555-57).

Upon returning to the Task Force Offices, Galasso performed a chemical test upon the substance purchased and determined that it was cocaine (Galasso: 292). At a later time, Mr. Edward Manning, a forensic chemist employed by the Drug Enforcement Administration, also chemically analyzed the drugs and determined that it was slightly more than a pound of cocaine (37.9% pure) (Manning: 533).

The Trial; Defense Efforts on Behalf of Petitioner

Petitioner's defense, by Otto Fusco, Esq., was based upon cross-examination of the state's witnesses and summation. The defense called no witnesses and neither defendant took the stand [597-599a].

Mr. Fusco both cross-examined State witnesses and objected to questions and to the introduction of evidence on direct examination on numerous occasions specifically in the interest of petitioner Salomon.

During the direct examination of Officer Fary, the State's first witness, Mr. Fusco requested that the tape recorder, which recorded the calls during which the drug transaction which resulted in this challenged conviction was arranged,

be admitted into evidence only with respect to Colon (52). In cross-examining Officer Fary, Mr. Fusco ascertained that Salomon never appeared on the tape recordings of the conversations with Colon (105) and he buttressed the defense that Salomon was merely a bystander by establishing Salomon's actual position inside the store where the transaction took place (144). Mr. Fusco also induced Officer Fary to state that he had no knowledge of the contents of the bag, carried by Salomon that was said to contain cocaine (147).

During the cross-examination of Officer Dunham, Mr. Fusco elicited that the witness never saw Salomon possessing narcotics (211).

Mr. Fusco requested and received an instruction that what Mr. Colon, the co-defendant, did and did not do was not binding on Salomon (285).

When the State's evidence dealt directly with Salomon, co-counsel, through cross-examination, attempted to limit its use by exploring its probative value (357-358, 412-413, 418-419).

Mr. Fusco prevailed on Justice Lowe to delete references to prior transactions between the co-defendant and Police Officer Galasso which indicated that the source of the drugs for the prior transactions would again be the source of drugs in the instant transaction (368-369).

In cross-examining Officer Galasso, Mr. Fusco established that Salomon had made no attempt to escape (419-420).

In discussing the "agent for buyer" defense to be propounded for Colon, Mr. Fusco correctly acknowledged to the Court that the evidence adduced would not support such a defense for Salomon (515). However, when the prosecution wished to introduce evidence of prior dealings of Colon in an attempt to undercut Colon's "agent for buyer" defense, Mr. Fusco successfully objected on the ground that Salomon would be implicated (516), Justice Lowe ruling that the evidence of prior dealings could not be introduced because it would prejudice Salomon and cause Mr. Fusco to limit his cross-examination (519).

At the close of the State's case, Mr. Fusco moved for dismissal of the indictment (597), and after the defense rested, Mr. Fusco renewed his motion (599) for both defendants.

In summation, Mr. Fusco pointed out the limited evidence implicating Salomon (609) and clearly suggested to the jury an innocent bystander defense, reiterating that Salomon had made no attempt to escape, and stating that "Salomon would

have been out and gone if he knew he had done anything wrong" (621). Mr. Fusco further reminded the jury of what Salomon said, according to Officer Galasso, when Salomon arrived with the package containing the cocaine; i.e., that "I have nothing to do with this, nothing at all" (623). Finally, Mr. Fusco remarked that Salomon did not walk out of the store with Galasso and Colon in order to receive the money in exchange for the narcotics (623), all of which evidence tended to support an innocent bystander theory.

The jury retired, following instructions by Justice Lowe, and returned 23 minutes later with a verdict of guilty on both counts for both defendants. On June 11, 1974, Justice Lowe sentenced defendant Victor Colon, under his conviction by jury for criminal sale and possession of a controlled substance in the first degree, to incarceration in the New York State Penal System for a period of natural life, the minimum of imprisonment 15 years, the sentences to run concurrently (Minutes of Sentencing p. 19).

Justice Lowe, on the same day, sentenced petitioner Mariano Salomon under his conviction by jury for criminal sale and possession of a controlled substance in the first degree, to incarceration in the New York State Penal System for a

period of natural life, the minimum of imprisonment 20 years, the sentences to run concurrently (Minutes of Sentencing p. 6). Petitioner's minimum term was longer than his co-defendant's because petitioner's probation report indicated that he was a large supplier of narcotics in his community and because he was in a leadership position in the instant crime (Minutes of Sentencing pp. 5-6).

THE STATE APPEALS

Petitioner Salomon appealed his conviction to the Appellate Division on the grounds that 1) trial counsel's joint representation of petitioner and his co-defendant deprived petitioner of effective assistance of counsel because trial counsel was preoccupied with the defense of the co-defendant and that the use of the defense of "agent for buyer" for the co-defendant and not for petitioner was clear evidence of a conflict between petitioner and his co-defendant and 2) that the sentence was excessive. The conviction was affirmed without opinion, People v. Salomon, 333 N.Y.S. 2d 347 (App. Div. 1st Dept. 1975) and leave to appeal was denied by the Court of Appeals.

PRIOR FEDERAL HABEAS CORPUS PROCEEDINGS

A. Initial Proceedings in the District Court

Petitioner Salomon filed a pro se application for a writ of habeas corpus with the United States District Court for the Southern District of New York on March 21, 1976. The case was assigned to Judge Pollack who issued a memorandum order denying the writ on July 20, 1976.

Petitioner's application was based on the assertion that his retained counsel was 1) inadequately prepared for trial 2) subject to a conflict of interest arising from his joint representation of petitioner and his co-defendant, such conflict arising from the assertion of the "agent for buyer" defense for the co-defendant and 3) improperly replaced by another attorney from his office prior to delivery of the jury charge.

In his decision of July 20, 1976, Judge Pollack dismissed the petition, finding that (1) the burden was on petitioner to show prejudice resulting from the joint representation (Exhibit B, Appendix for petitioner, p. 2, footnote); (2) petitioner had expressly consented on the trial record both to the adequacy of counsel's preparation and to the substitution of counsel late in the trial proceedings (Id. p. 1); and

(3) petitioner had failed to meet his burden of making the requisite concrete showing of "some specific instance of prejudice, some real conflict of interest resulting from the joint representation" (Id. at 2) in that "there is no reason to believe [separate] counsel for co-defendant would not have pressed the 'buyers agent' defense for Colon, and no claim is made that Salomon was dissuaded from testifying because of the joint representation." (Id. at 3).

B. Petitioner's First Appeal to this Court

Petitioner filed a pro se application to this Court seeking a certificate of probable cause, for leave to appeal in forma pauperis and for assignment of counsel. On March 17, 1977, this Court made an ex parte order vacating the judgment of the District Court and remanding for consideration of the question of waiver.

C. The Hearing in the District Court

In response to the remand order of the Court of Appeals, Judge Pollack held a hearing on June 2 and June 3, 1977. Petitioner Salomon was the first witness.

On direct examination petitioner testified that he had retained Fernando Fusco, brother and partner of Otto Fusco, as his attorney (H, p. 9).^{*} Petitioner had conferred with a number of attorneys from the office of Fusco and Fusco prior to trial (H, p. 10). There were, according to petitioner's testimony, no discussions of a possible conflict between the defenses of the co-defendants (H, p. 11). The petitioner did not remember discussing the case with Otto Fusco on the day of the trial (H, p. 12). Petitioner also testified that the "agent for buyer" defense was not discussed before trial (H, p. 13).

On cross-examination, the Assistant Attorney General elicited from petitioner that he had four previous convictions (H, p. 17) and that Fernando Fusco had been petitioner's attorney on at least two previous occasions (H, p. 21).

Petitioner also stated that both defendants had desired a two week adjournment (H, p. 24), but after conferring with Otto Fusco, petitioner had told Justice Lowe that "it was all right" to proceed with Otto Fusco (H, pp. 25, 31). Petitioner also admitted that Otto Fusco had asked him if he wanted to testify (H, p. 31) and had made no suggestion that petitioner should not testify (H, p. 32).

^{*} Page references preceded by "H" refer to the hearing in the District Court.

Fernando Fusco was the next witness. He indicated that he had appeared on behalf of petitioner on one or two occasions in Bronx Criminal court and on one occasion in Part E and that during this period of representation he had seen no possibility of conflict in the representation of the two defendants (H, p. 50) and that petitioner had at no time indicated to him that he was concerned about a possible conflict between himself and his co-defendant (H, pp. 53-54). The witness further testified that his firm, Fusco and Fusco, had previously represented the petitioner (H, p. 46), that he had considered, at the time, the possibility that a conflict might develop as a result of the joint representation of petitioner and his co-defendant (H, p. 47), that he in fact had seen no conflict, and that if he had perceived a conflict he would not have jointly represented the co-defendants (H, p. 49). He also stated that no commitments were made to either defendant which fettered or restrained the representation of the other (H, p. 49).

Otto Fusco, who had actually tried the case (H, p. 56) was the next witness. He stated that the co-defendant had wished to plead guilty but that petitioner had desired to go to trial (H, pp. 57-58) and that both had gone to trial because the Assistant District Attorney had refused to accept a plea from only one defendant (H, p. 58).

Fusco also stated that he was able to thoroughly review all the facts of the case during the several days it took to pick a jury and that he had many hours of conference with both defendants before proceeding to trial (H, p. 59). Mr. Fusco repeatedly stated that in his view the defenses of his two clients were absolutely not antagonistic (H, pp. 60, 67, 73), that he had made no commitment to one which fettered or restrained the representation of the other, and that he had not advanced any argument which in his opinion embarrassed or impaired the position of the other (H, p. 61). He also stated that neither defendant had failed to take the stand out of deference to the other (H, p. 61).

On cross-examination petitioner's lawyer advanced the same argument concerning the alleged prejudice to petitioner resulting from his co-defendant's "agent for buyer" defense that had unsuccessfully been made in the State appeal and to Judge Pollack in the original writ application, and which is the basis for this appeal as well. Mr. Fusco unequivocally rejected this view:

"MR. BLACKSTONE [Petitioner's Attorney]: May I restate my question?

Q. When you make the argument that a defendant or individual is actually working at the behest of a buyer in the case of

a transaction, a narcotics transaction, isn't that a concession that the transaction was occurring or would occur?

A. [Otto Fusco] Not necessarily. Would it occur? It might occur. That doesn't mean necessarily that it did occur.

Q. Isn't it a fact that by arguing the agent-for-buyer defense at the behest of Colon you were conceding that the sale took place?

A. No, I was not. I didn't concede that at all. You read my entire summation. You'll see what I'm talking about.

Q. Isn't that a reasonable inference that a juror could make, that if the attorney is saying that my client, Mr. Colon, is an agent for the undercover officer, he was working at his behest and not at the behest of the seller, isn't that the concession?

A. That sale -- no.

Q. That there was a sale, not necessarily that Salomon sold, but that there was a sale?

A. No, it is not. It doesn't go that far.

Q. But the implication is there?

THE COURT: You are not letting him answer. You keep on arguing.

MR. BLACKSTONE: Withdrawn.

THE WITNESS: I'm going to tell you something. That particular request on my part of Judge Lowe was a desperate request, because

this matter he e, this whole matter, was from the t me go until the jury's verdict in this case -- even though I made that request of Judge Lowe I didn't expect her to grant it because it wasn't warranted, and that is why I made the request. It wasn't warranted based on all the evidence. There were tapes in this case and the tapes would have dispelled any agency on the part of Colon with any undercover agent. It would have dispelled that.

THE COURT: The point that Mr. Blackstone is attempting to make is this: Were you giving up the denial of any sale by suggesting that Colon was working in cahoots with the police?

THE WITNESS: Absolutely not, I wasn't. That is why I say my summation has to be looked at in its entirety to determine which way I was going.

THE COURT: In your summation did you deny that there was any sale made by Salomon?

THE WITNESS: Absolutely, as I remember, Judge." (H, pp. 68-70).

The discussion continued:

"MR. BLACKSTONE:

Q. Can you tell me where Salomon is left at this trial when you are arguing to a jury and asking the judge to charge that the co-defendant Colon was actually working on this drug sale at the behest of the buyer, not the seller; where does that leave Salomon?

- A. Did you hear the judge just read --
- Q. I'm asking you, sir.
- A. I'm going to explain it to you. Okay? If Salomon had been culpable he would have gone through the rear of this store. I have at no time admitted that Salomon here brought in any narcotics there or made any effort to make a sale to any undercover agent or anybody else. That is where it leaves Salomon. We never conceded that Salomon ever brought in any narcotics or made any sale.
- Q. When you say never conceded, you never expressly conceded, so that isn't there an implication that if you argue that one individual that you represent is actually taking part in a negotiation for the sale of drugs, aren't you conceding that something having to do with the sale of drugs occurred?
- A. I'm not conceding the fact, even though this person here might have been an agent for the undercover agent that anything that developed out of it with the sale made by Salomon to anybody. You understand? Apparently we don't see eye to eye in that respect". (H, pp. 73-74).

Mr. Fusco also noted that when the Assistant District Attorney desired to introduce evidence of prior dealings to counteract the agent for buyer defense, Mr. Fusco had successfully objected that petitioner would be implicated and that it would be prejudicial, thereby keeping evidence of prior transactions involving petitioner from the jury (H, p. 78).

D. The District Court's Decision

The District Court rendered a second decision on June 17, 1977, carefully weighing the evidence adduced at the hearing and again finding that petitioner had failed to show any prejudice resulting from the joint representation.

The specific instance of prejudice alleged was that petitioner's trial lawyer had argued, and requested that the judge instruct the jury, that it must acquit the co-defendant if it found that the co-defendant had acted "as the agent of the buyer in the narcotics sale and not in concert with the unidentified seller" (Exhibit D, Appendix for Petitioner, p. 2). Petitioner further claimed that, as no similar argument was presented on his behalf, his denial of guilt was prejudiced as the "agent for buyer" defense could be taken as a concession that a narcotics sale had taken place in which the co-defendant was not the real seller, and that the jury would be led to believe that petitioner was that seller.

Judge Pollack rejected petitioner's claim, finding that "petitioner has failed to demonstrate that the joint representation or his lawyer's trial strategy was conducive to or created or resulted in any conflict of interest or prejudice",

and that "consequently, the question of waiver. . .is not and need not be reached in the circumstances of this case" (Id. at p. 3). In support of this finding, Judge Pollack cited Otto Fusco's testimony that the "trial argument that the co-defendant was an agent of the narcotics purchaser in no way implied that petitioner was the seller" (Id. at p. 2), and further found that petitioner's attorney had discussed with him the proposed use of the "agent for buyer" defense for the co-defendant and that petitioner had expressed his approval. While petitioner had testified at the hearing that he did not understand what was meant, Judge Pollack found that "the record herein and the demeanor evidence satisfy the Court that such testimony is not worthy of belief and is factually rejected." (Id. at p. 3).

Additionally, Judge Pollack noted that presentation of an agent for buyer defense for petitioner Salomon "might well have drawn him into the circle of the sale instead of leaving him outside of it as an innocent bystander"; that Colon was in fact found guilty despite the imposition of this defense on his behalf, and the fact that both defendants "had expressly told the trial judge that they were willing to be represented by Mr. Fusco, and neither expressed any concern to Mr. Fusco or the judge during the trial."

It is this decision from which petitioner appeals, arguing that his joint counsel's assertion of an "agent for buyer" defense on behalf of his co-defendant, Victor Colon, conflicted with his defense of petitioner, thereby depriving petitioner of his Sixth Amendment right to effective assistance of counsel. He also argues that he did not waive his right to challenge the effectiveness of his attorney on that basis (Petitioner's Brief to this Court, hereinafter "Pet.'s Br.," at 17).*

* Petitioner's brief also speculates as to other prejudice arising out of the joint representation, including the failure to seek a severance, to "trample on" Colon's defense, to argue that Salomon was Colon's "courier" or "agent for buyer", and to introduce evidence on, cross-examine on, or request a charge for "innocent bystander" for Salomon. He also challenges the summation in that Fusco failed to argue that someone else was the seller, failed to dispute the veracity of State witnesses, and failed to claim a "frame." (Pet.'s Br. at 23-4).

ARGUMENT

POINT I

JUDGE POLLACK'S FINDING, AFTER A FACTUAL HEARING, THAT NEITHER A CONFLICT OF INTEREST NOR PREJUDICE AROSE OUT OF THE JOINT REPRESENTATION OF PETITIONER AND HIS CO-DEFENDANT DURING THEIR STATE COURT TRIAL WAS CLEARLY CORRECT.

Judge Pollack's finding that neither a conflict of interest nor prejudice arose out of the joint representation of petitioner and his co-defendant was made after a Townsend hearing* at which petitioner and his lawyers were carefully examined. The finding was based on Judge Pollack's observations of the demeanor of, and determinations as to the credibility of the witnesses, as well as his careful weighing of the evidence presented, and it may only be disturbed by this Court if it is "clearly erroneous." Fed. Rules of Civ. Proc. R. 52.

United States ex rel. Marcelin v. Mancusi, 462 F. 2d 36, 46 (2d Cir. 1972), cert. den. 410 U.S. 917 (1973); United States ex rel. Fitzgerald v. LaVallee, 461 F. 2d 601 (2d Cir. 1972), cert. den. 409 U.S. 885 (1972); United States ex rel. Griffin v. McMann, 413 F. 2d 301 (2d Cir. 1969).

* Townsend v. Sain, 372 U.S. 293 (1962).

Petitioner's attempts to challenge the finding of neither conflict nor prejudice are no more than a rehash of arguments made during the hearing, and are based on a view of the facts wholly unsupported both by the record in the state court criminal trial as well as the hearing record.

Petitioner's primary claim in his application for a writ of habeas corpus and to this Court is that his Sixth Amendment right was violated because the counsel he and Colon, his co-defendant, retained jointly interposed an "agent for buyer" defense for his co-defendant, and a general denial of petitioner's guilt, which he claims worked to his prejudice.

Other claims of prejudice raised in petitioner's application were alleged to arise out of the joint counsel's "pre-occupation with the co-defendant's defense", the failure to raise an "agent for buyer" defense for petitioner, the substitution of counsel, and the "failure of the trial judge to admonish the jury properly in her preliminary instructions". Petitioner's Application for a Writ of Habeas Corpus, Appendix, Exh. E.

In rejecting all of petitioner's claims of prejudice, Judge Pollack carefully reviewed the evidence at the hearing and the record of the state court trial, and concluded both that the agent for buyer defense for Colon "was in no way inconsistent with nor prejudiced the defense that petitioner was merely an innocent bystander", and that petitioner had "failed to demonstrate that the joint representation or his lawyer's trial strategy was conducive to or created or resulted in any conflict of interest or prejudice." (App., Exh. D, p. 3).

Specifically, Judge Pollack based his finding of lack of prejudice on the following:

(1) Otto Fusco's testimony that the two defenses were not, in his opinion, antagonistic, that the evidence adduced in the case would not have supported an inference that petitioner was an agent for the buyer, and that his theory of petitioner's defense was that he was "not a seller of drugs, and indeed was not involved in the drug transaction in issue at all, but instead was a mere innocent bystander".

(Ibid.)

(2) A finding, supported by the trial record, as well as Otto Fusco's testimony at the hearing, that Fusco had made this defense for petitioner in his summation. (Id. p. 2).

(3) A finding, clearly supported both by logic and the trial and hearing records, that an agent for buyer defense for petitioner "might well have drawn him into the circle of the sale instead of leaving him outside of it as an innocent bystander", and that this defense had been of no avail to co-defendant

Colon, who was found guilty despite the imposition of this defense. (Id. p. 3).

(4) Otto and Fernando Fusco's testimony that "they saw no potential or actual conflict. . .and that they would have withdrawn from the representation of the defendants if they had." (Ibid.)

Judge Pollack correctly dismissed petitioner's application for a writ of habeas corpus on these findings, for the law is clearly in this Circuit that

"The mere representation of two or more defendants by a single attorney does not automatically give rise to constitutional deprivation of counsel. It is settled in this Circuit that some specific instance of prejudice, some real conflict of interest, resulting from a joint representation must be shown to exist before it can be said that an appellant has been denied the effective assistance of counsel." United States v. Carrigan, 543 F. 2d 1053, 1055 (2d Cir. 1976).

This test applies equally in habeas corpus challenges

to joint representation in state trials. Kaplan v. Bombard,
___ F. 2d ___ (2d Cir. 1978) Slip Op. 1585, 1592 (February 15,
1978); United States ex rel. Hussey v. LaVallee, 428 F. 2d 457,
458 (2d Cir. 1970).

Petitioner does not challenge the applicability of this
test; rather he argues that Judge Pollack's findings that no
prejudice resulted from the joint representation are incorrect.
Testing these findings by the "clearly erroneous" standard,
however, it is clear that Judge Pollack's decision must be
affirmed.

Of primary importance is the Fuscos' testimony that, had they believed that a conflict of interest was presented by the joint representation, they would have withdrawn from the defense of one of the co-defendants (H, pp. 49 and 61; App. Exh. D, p. 3), and this testimony is entitled to great weight. Kaplan, supra, Slip Op. at 1596-7. As was noted by this Court in United States v. Paz-Sierra, 367 F. 2d 930, 932-3 (2d Cir. 1966), cert. den. 386 U.S. 935 (1967):

No facts have thus far been presented that the Bar of this country is so unmindful of the canons of ethics and its obligation to avoid positions of conflict as to call for a pre-trial cross-examination of defendants and their counsel on the theory, or even presumptuous presumption, that counsel will not be faithful to the best interests of their clients and when aware of any conflict of interest between clients jointly represented whether before or during trial will not disclose it to the court and seek appropriate relief.

Similar, and equally apt, observations were made by this Court in United States v. Wisniewsky, 478 F. 2d 274, 285 (2d Cir. 1973):

Absent objective proof we cannot assume that a lawyer representing more than one client would act in violation of the Code of Professional Responsibility, much less ignore the opportunity to introduce proof which might acquit one defendant but not the other.

See also United States v. Armone, 363 F. 2d 385, 406 (2d Cir. 1966), cert. den. Viscardi v. United States, 385 U.S. 957 (1966) and United States v. Cale, 418 F. 2d 897, 899 (6th Cir. 1969), cert. den. 397 U.S. 1015 (1970).

The trial record also clearly shows that, in spite of the overwhelming strength of the People's case, defense counsel did everything he could to undermine the case against Salomon, and that no conflict of interest developed during trial. See "Defense Efforts on Behalf of Petitioner", supra.

Petitioner's claim of prejudice based on the allegedly inconsistent "agent for buyer" and "innocent bystander defenses" is a purely speculative one, correctly rejected, on the facts of this case, by Judge Pollack, and as such is clearly distinguishable from the clear prejudice which formed the bases for successful federal appeals in the three cases petitioner cites -- Glasser v. United States, 315 U.S. 60 (1942); United States v. DeBerry, 487 F. 2d 448 (2d Cir. 1973), and United States v. Carrigan, 543 F. 2d 1053 (2d Cir. 1976).

The Supreme Court held that Glasser's Sixth Amendment rights were violated because real prejudice had resulted from his joint representation -- cross-examination of a defense witness, which was "indicated in Glasser's interest", had been

postponed to protect another defendant, and no objection had been raised on Glasser's behalf to hearsay evidence for the same reason. 315 U.S. at 73, 75. On these findings, the verdict in the federal criminal trial was set aside and a new trial ordered.

In Carrigan, Carrigan alone took the stand, and made statements contradicting those made by his co-defendant to the FBI, which were also before the court. In summation, their joint attorney also commented on the fact that only Carrigan had testified. This Court correctly found the resultant prejudice to both "inescapable", as the tactics of their joint counsel had resulted in each defendant challenging the credibility of the other on a critical point.

In DeBerry, one defendant gave testimony openly implicating his co-defendant. Moreover, defense counsel's cross-examination of a Government witness was expressly devised to plan an inference as to the guilt of this same defendant. This Court held that "no one should be represented by an attorney who is making him the 'fall guy' by design", 487 F. 2d at 454, reversed the federal conviction and remanded for a new trial.

In sharp contrast with these examples of manifest prejudice, which resulted, not in freeing the appellants but in remands for new trials, petitioner Salomon's allegations of prejudice are based purely on speculation as to the effect of Colon's "agent for buyer" defense on his "innocent bystander" stance. That such speculation, considered and rejected by Judge Pollack, cannot give rise to a Sixth Amendment violation is clearly illustrated by United States v. Sheiner, 410 F. 2d 337 (2d Cir. 1969), cert. den. 396 U.S. 859.

Sheiner and his co-defendant Piacentile had been represented at a federal trial by the same attorney. Sheiner was accused of selling counterfeit coins as agent for Piacentile, and therefore theoretically had a defense that Piacentile had never told him the true nature of the coins. Neither took the stand.

On appeal from his conviction, Sheiner argued that his Sixth Amendment right had been violated by the joint representation, because "separate counsel could have emphasized that he lacked any guilty knowledge, having acted wholly in reliance on Piacentile's story about the coin's origins," a position similar to that of "innocent bystander" taken on behalf of petitioner by his lawyer, at his trial.

This Court refused to overturn the conviction, noting that, although neither defendant testified, portions of Sheiner's testimony before the grand jury, introduced at trial, "did clearly convey this version", (i.e. that Sheiner lacked guilty knowledge) and therefore finding "the actual conflict of Sheiner's and Piacentile's interests and the possible prejudice which the former might have suffered to be so minimal as to warrant affirmance even in the absence of his explicit acquiescence in joint representation." 410 F. 2d at 343.

Sheiner's other claims of prejudice were centered around the speculation that "his own counsel might have sought to use a variety of trial strategies more advantageous to him such as. . .a motion to sever." Such speculation is also made by counsel for petitioner Salomon herein, who suggests, inter alia, that independent counsel might have sought a severance, "trampled on Colon's defense", or argued an agent for buyer defense for Salomon. (Pet's. Br. to this Court, pp. 23-4).

The short answer to these arguments was put bluntly by this Court in Sheiner: "the possibility that [petitioner's] present appellate counsel might have employed different or arguably better trial techniques does not rise on these facts

to the level of prejudice sufficient to require" the granting of his habeas corpus petition. 410 F. 2d at 343.*

* As for Salomon's argument that an agent for buyer instruction should have been sought on his behalf, the failure to do so certainly was not a result of the joint representation. Rather, the charge was not requested because there was absolutely no evidence adduced at trial which would have supported it. All of the contacts with the buyer, Undercover Officer Rocco Galasso, were made by Victor Colon. All of the telephone conversations were between Galasso and Colon. All of the arrangements for the purchase of the pound of cocaine were made between Galasso and Colon. Salomon surfaced only on the day of the purchase, as the principal seller with the pound of cocaine. Since the People's evidence conceivably raised an issue of fact for the jury as to whether or not Victor Colon was acting solely as the buyer's agent, he was entitled to a charge on the defense of agency. People v. Lindsey, 16 A D 2d 805 (2d Dept. 1962), affd. 12 N Y 2d 958 (1963). See People v. Johnston, 47 A D 2d 897, 900 (2d Dept. 1975); People v. Silverman, 23 A D 2d 947 (3d Dept. 1967); People v. Branch, 13 A D 2d 714 (4th Dept. 1961). However, since there was no view of the evidence which raised an issue of fact for the jury to consider whether Salomon was an agent of the buyer, he would not have been entitled to a charge on this defense, even if one had been requested. People v. Fowler, 46 A D 2d 838 (3d Dept. 1974); People v. Gory, 30 A D 2d 975 (2d Dept. 1968); People v. Jamison, 29 A D 2d 973 (2d Dept. 1968). Cf. People v. Lindsey, supra.

In rejecting Sheiner's speculative claims of prejudice, this Court was reiterating the often-stated principle that "[t]he possibility here that another approach might have been used, with better results for the defendant, exists in every case and is very far indeed from making out a deprivation of constitutional right" arising from joint representation. United States v. Foster, 469 F. 2d 1, 4 (1st Cir. 1972) Further, Foster cautions that the omissions of joint counsel complained of (in that case, failure to call certain witnesses and request various instructions, including an "agent for buyer" defense) must be linked by the record to a conflict of interest arising from the joint representation. Id. See also Kaplan v. Bombard, supra, Slip Op. at 1594 (decision not to call one co-defendant is "matter of sound trial tactics", as are other instances of alleged prejudice urged "with 20-20 hindsight", including "emphasis in cross-examination, failure to interpose objections, failure to call a witness. . . , requests to charge and summation"); United States v. Garquilo, 324 F. 2d 795, 797 (2d Cir. 1965), a coram nobis proceeding not involving joint representation, but which is referred to in Kaplan and expressly adopted in Morgan v. United States, 295 F. Supp. 967, 971-2 (D. Ct. Conn. 1968) on remand from 396 F. 2d 110 (2d Cir. 1968), where the court declined to find prejudice resulting from joint

representation on mere complaints of "alleged tactical errors or mistakes in strategy," quoting Garguilo; United States ex rel. Hussey, supra, 428 F. 2d at 458 (effects of failure of joint counsel to call a particular witness and oppose severance are "at best a matter of speculation"); United States v. Lovano, 420 F. 2d 769, 774 (2d Cir. 1970), cert. den. 397 U.S. 1971 (1970) ("mere speculation" as to effect of failure to call a particular witness is only a "theoretical conflict of interest"); and United States v. Armone, supra, 363 F. 2d at 406 (mere speculation that joint counsel did not suggest additional character witnesses for Armone, because co-defendants could not have produced similar witnesses, and "brushing off" of a co-defendant in summation did not create prejudice).

The observations of this Court in United States v. Wisniewski, supra, 478 F. 2d at 284, in rejecting a Sixth Amendment joint representation claim raised in a direct federal appeal, apply even more forcefully to all of petitioner's claims in this action for habeas corpus relief:

"When a trial culminates in a verdict of guilty the temptation is great for a defendant, armed with hindsight, to claim that his lawyer's strategy was motivated by a conflict of interest. We do not say that such belated assertions are to be ignored. Each case must, of course, be viewed on its own facts.

However, in the absence of objective evidence of corroboratory circumstances, such post-trial claims must be viewed with some suspicion. . . ."

POINT II

HAVING FOUND THAT THE JOINT REPRESENTATION CAUSED NEITHER CONFLICT OF INTEREST NOR PREJUDICE, JUDGE POLLACK DID NOT HAVE TO REACH THE RELATED QUESTIONS OF WAIVER AND CONSENT. ASSUMING, ARGUENDO, THAT FINDINGS ON THESE QUESTIONS WERE NECESSARY, HOWEVER, PETITIONER CONSENTED TO THE JOINT REPRESENTATION.

On March 11, 1977, this Court vacated Judge Pollack's original decision denying petitioner's application for a writ of habeas corpus and remanded for a hearing on the question of waiver. Such a hearing was held, and the resulting decision, again denying the application in all respects, was made "upon consideration of the question in the framework of the facts in the instant situation." Specifically, Judge Pollack held that, in light of his finding of neither conflict of interest nor prejudice, "the question of waiver. . . is not and need not be reached in the circumstances of this case."

This holding was clearly correct. In Kaplan v. Bombard, supra, decided on February 15, 1978 (one year subsequent to the remand order), this Court stated that consideration of the related questions of waiver of the right to effective counsel and consent to joint representation need not be reached when the joint representation, challenged in a habeas corpus proceeding on Sixth Amendment grounds, has been found not to have resulted in prejudice or conflict of interest:

"Having held on the basis of the trial record as well as the record of the pre-trial inquiry that there was no specific instance of potential or actual prejudice or any real conflict of interest, under the law of this Circuit it is unnecessary for us to reach the question of whether Kaplan consented to the joint representation." (Slip op. at 1594)

See also Sheiner, supra:

...we find the actual conflict of Sheiner's and Piacentile's interests and the possible prejudice which the former might have suffered to be so minimal as to warrant affirmance even in the absence of his explicit acquiescence in joint representation. See United States v. Goldberg, 401 F. 2d 644, 648 (2d Cir. 1968); United States v. Paz-Sierra, 367 F. 2d 930, 932-933 (2d Cir. 1966), cert. den. 386 U.S. 935, 87 S. Ct. 962, 17 L. ed. 2d 807 (1967); United States v. Bentvena, 319 F. 2d 916, 937 (2d Cir.), cert. den. 375 U.S. 940, 84 S. Ct. 345, 11 L. ed. 2d 271 (1963).

410 F. 2d at 343
(emphasis added).

Although Judge Pollack was clearly following the law of this Circuit in deeming it unnecessary to reach the question of waiver, in light of "the earnestness with which [petitioner's] able counsel on appeal urges the claim of lack of consent," (Kaplan, supra, n. 6, Slip Op. at 1594), some discussion of the issue may be merited.

We begin with a proper formulation of the question. As this Court stated in Kaplan,

At the outset we note that, although counsel have cast the question as one of waiver, we believe that this "is not truly a case of waiver of a constitutional right; it is a decision to assert one constitutional right instead of another." United States v. Bubar, F. 2d _____, n. 18 (2d Cir. 1977), slip op. 4519, 4538 n. 18 (June 30, 1977), quoting from United States ex rel. Konigsberg v. Vincent, 526 F. 2d 131, 133-34 (2d Cir. 1975) (Feinberg, J.), cert. den. 426 U.S. 937 (1976). See United States ex rel. Martinez v. Thomas, 526 F. 2d 750, 756 n. 8 (2d Cir. 1975). Upon the record before us we believe that the question presented is not whether Kaplan waived his constitutional right to the effective assistance of counsel, but more accurately whether he asserted his constitutional right to be represented by counsel of his own choice -- in short, to be represented jointly by counsel who also represented his co-defendants. Slip Op. at 1594-5.

That petitioner affirmatively asserted this right, consenting both to the joint representation and to the use of

the agent for buyer defense for his co-defendant Colon, is clear both from the trial record and the district court hearing, and Judge Pollack specifically found such consent in the decision appealed from:

Moreover, petitioner testified that his attorney discussed with him the proposed use of the "agent for buyer" defense for the co-defendant before the summation and requests to charge were made, and that petitioner had expressed his approval. Petitioner testified on the hearing that he did not understand what was meant, but the record herein and the demeanor evidence satisfy the Court that such testimony is not worthy of belief and is factually rejected.

Petitioner and the co-defendant had expressly told the trial judge that they were willing to be represented by Mr. Fusco, and neither expressed any concern to Mr. Fusco or the judge during the trial. (App. Exh. D, pp. 3-4).

These findings are supported both by the trial and the hearing records (H, pp. 13, 15-16, 25, 30-31; Trial Transcript, 14) and Salomon's prior experiences in the criminal justice system further support the inferences both that he understood the nature of the defenses raised for him and his co-defendant and that he knowingly and intelligently exercised

his right to the counsel of his choice. United States v. Rosenthal, 470 F. 2d 837, 838 (2d Cir. 1972); Wisniewsky, supra, 478 F. 2d at 284; United States ex rel. Konigsberg v. Vincent, 526 F.2d 131, 134 (2d Cir. 1975), cert. den. 426 U.S. 937 (1976).

The fact that petitioner's consent to the defenses raised on his and co-defendant's behalf was given to his counsel, and not elicited directly by Justice Lowe, is irrelevant. Kaplan, Slip Op. pp. 1595-6, citing Sheiner, supra, 410 F. 2d at 341-3.

In phrasing the question in terms of consent, rather than waiver, this Court in Kaplan recognized that the Sixth Amendment guarantees both the right to effective assistance of counsel and the right to be represented by counsel of one's choice.

Recognition of both guarantees is especially important, where, as here, petitioner expressly told the trial judge that he felt he would be adequately represented by Mr. Fusco (Trial Transcript at 14). Any further inquiry may well have run the risk of interfering with Salomon's and his co-defendant's attorney-client relationship.

People v. Gonzales, 30 N Y 2d 28, 34
(1972), cert. den. 409 U.S. 859 (1972).

Appellant in Gonzales was appealing his conviction on the ground of conflict of interest arising from joint representation. Despite the fact that the co-defendants were asserting clearly different defenses to the murder charges against them, one arguing self-defense and the other denying shooting the victim, the New York Court of Appeals found no conflict had arisen as a result of the joint representation. In marked similarity to the instant case, the court reasoned inter alia that there was no conflict of interest arising out

As this Court noted in Sheiner, supra, 410 F. 2d at 342, "defendants who retain counsel also have a right of constitutional dimensions to representation by counsel of their own choice", and this choice "should not be unnecessarily restricted by the Court." United States v. Bernstein, 533 F. 2d 775 (2d Cir. 1976). Further, when an individual retains joint counsel with a co-defendant from the inception of the proceedings, "the choice of the individual should not be disturbed, absent facts which might call to the Court's attention the individual's inability to make a free choice." Morgan, supra, 295 F. Supp. at 971, citing Paz-Sierra, supra.

See also Cale, supra, and People v. Gonzalez, 300 F. 2d 1000 (2d Cir. 1962).

of joint representation since, as here, they both had had the same interest in discrediting the People's witnesses and their lawyer pursued that course vigorously.

At no time during the trial had Gonzales, his co-defendant, or their lawyer complained that the defense was being hampered by the joint representation. The Court of Appeals deemed this fact irrelevant, in light of its finding of neither conflict of interest nor prejudice:*

Moreover, for the Trial Judge to have intervened in this case (see Glasser v. United States, 315 U.S. at pp. 71-72; People v. Byrne, 17 N Y 2d at pp. 215-216) would have been an entirely unwarranted interference with the attorney-client relationship and might well have constituted an infringement upon the defendant's right to retain counsel of his own choosing. (Cf. Chandler v. Fretag, 348 U.S. 3, 9; Powell v. Alabama, 287 U.S. 45, 53; People v. Silverman, 3 N Y 2d 200, 202; People v. Price, 262 N.Y. 410, 412).

* Gonzales was decided three years prior to People v. Gomberg, 38 N Y 2d 307 (1975), where the New York Court of Appeals mandated state trial judges to hold hearings whenever criminal defendants are jointly represented. That Court has not yet ruled, however, on the questions of (1) retroactivity or (2) the consequences of failure to hold such a hearing.

Not only would detailed inquiry by Judge Lowe have run the risk of interfering with Salomon's and Colon's attorney-client relationship, it might also have violated their privilege against self-incrimination. As this Court noted in Paz-Sierra, supra, "[t]o learn all the controlling facts, the trial judge would have to require each defendant to tell him (Fifth Amendment rights notwithstanding) his version of the alleged crime". 367 F. 2d at 932.

POINT III

JUDGE POLLACK WAS CORRECT IN PLACING THE BURDEN OF PROVING CONFLICT OF INTEREST AND PREJUDICE ON PETITIONER

Habeas corpus is a collateral proceeding. It is not another step in the state appellate process; it is not a substitute for state appeal or trial; it is an independent inquiry initiated by a convicted prisoner with its own standards and burdens and, in light of the extraordinary nature of its remedy, in almost all such proceedings those standards and burdens must be met and carried by the moving party.

The Supreme Court has long held that in a habeas corpus proceeding, the burden is on the petitioner to prove, by a preponderance of the evidence, that his conviction was

obtained by unconstitutional means. Henderson v. Kibbe, ___ U.S. ___, 97 S. Ct. 730 (1977); McMann v. Richardson, 397 U.S. 759 (1969); Walker v. Johnston, 312 U.S. 275, 286 (1941); Hawk v. Olson, 326 U.S. 271, 276 (1945); Johnson v. Zerbst, 304 U.S. 458, 468-9 (1938).

This "well-established governing principle", United States ex rel. Curtis v. Zelker, 466 F. 2d 1092 (2d Cir. 1972), cert. den. 410 U.S. 945 (1973) has been continuously recognized by this Court, United States ex rel. Marcelin, supra; United States ex rel. Fitzgerald, supra; United States ex rel. Schuster v. Herold, 410 F. 2d 1071 (2d Cir. 1967) cert. den. 397 U.S. 847 (1969), and has been properly placed by this Court on habeas corpus petitioners challenging State court convictions on the ground that their joint representation violated their Sixth Amendment rights. United States ex rel. Hussey, supra, affirming 302 F. Supp. 306, 308 (E.D.N.Y. 1969), Kaplan, supra, ns. 7 (Slip Op. at 1595) and 9 (Slip Op. at 1597). Other Circuits have similarly placed this burden on jointly-represented habeas corpus petitioners -- Kruchten v. Eyman, 406 F. 2d 304 (9th Cir. 1969), vacated in part 408 U.S. 934 (1972), rehearing denied 409 U.S. 897; Curry v. Burke, 404 F. 2d 65, 67 (7th Cir. 1968) (burden is on petitioner

to establish conflict of interest by "clear and convincing evidence") -- and petitioner Salomon points to no Circuit where this burden has been shifted in a habeas corpus proceeding to the State, whether or not a hearing on the conflict question had been held by the State trial court.

Judge Pollack was therefore following well-established principles in placing the burden of showing conflict of interest and prejudice on petitioner in the instant case.

Reliance by petitioner on DeBarry, supra and Carrigan, supra, for the proposition that, "if the trial court has failed to conduct an inquiry, the burden of proof on the question of prejudice shifts to the government" is misplaced, and indeed that precise argument was rejected by this Court in Kaplan, Slip Op. at 1397. As Judge Pollack noted in his original decision, "this shift [in the burden of proof] has been devised by the federal courts of appeals in the exercise of their supervisory power. . .and is not constitutionally compelled, see United States v. Mari, 526 F. 2d 117, 120 (2d Cir. 1975) (Oakes, J., concurring). Accordingly, it is not applicable to the review of state court proceedings on a petition for a habeas writ. . ." (App. Exh. B, p. 2).

It was precisely for those reasons that the majority of this Court in Kaplan rejected Judge Mansfield's view, in his concurring opinion, that the burden should be shifted to the State "because of the inadequacy of the State judge's inquiry":

"Our concurring colleague's separate opinion, of course, should be read with the distinction in mind between our roles (a) in exercising our supervisory power on direct appeals in criminal cases, which the instant case is not, and (b) in exercising, as we do here, our far more limited power of reviewing on federal habeas corpus a unanimous decision of the New York Court of Appeals to determine whether error of constitutional dimensions has been committed. This distinction is reflected in Judge Mansfield's reliance, in his concurring opinion, solely upon cases [i.e. Carrigan and DeBarry] which arose under the federal courts' supervisory power on direct appeals in criminal cases."

Slip Op. at 1597
(emphasis in original)

CONCLUSION

FOR THE FOREGOING REASONS, THE
DISTRICT COURT OPINION DISMISSING
PETITIONER'S APPLICATION FOR A
WRIT OF HABEAS CORPUS SHOULD BE
AFFIRMED IN ALL RESPECTS.

Dated: New York, New York
March 13, 1978

Respectfully submitted,

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